

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

<b>IN RE:</b>	)	<b>Chapter 11</b>
	)	
<b>BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i>,<sup>1</sup></b>	)	<b>Case No. 09-12074 (KJC)</b>
	)	
<b>Debtors.</b>	)	<b>Jointly Administered</b>
	)	
	)	<b>Ref. Docket Nos. 9 and 55</b>

**NOTICE OF ENTRY OF INTERIM ORDER AND FINAL HEARING**

TO: (I) THE OFFICE OF THE UNITED STATES TRUSTEE FOR THE DISTRICT OF DELAWARE; (II) THE DEBTORS' FIFTY LARGEST UNSECURED CREDITORS ON A CONSOLIDATED BASIS; (III) COUNSEL TO WELLS FARGO BANK, N.A., AS AGENT FOR BOTH OF THE DEBTORS' PREPETITION AND POSTPETITION LENDERS; AND (IV) ALL PARTIES THAT HAVE REQUESTED NOTICE PURSUANT TO RULE 2002 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE.

**PLEASE TAKE NOTICE** that on June 16, 2009, the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**") filed the **Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Pay (A) Prepetition Wages, Salaries, and Other Compensation, (B) Reimbursable Employee Expenses, and (C) Employee Medical and Similar Benefits; and (II) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers** [Docket No. 9] (the "**Motion**"), a copy of which is attached hereto as Exhibit A. On June 17, 2009, the United States Bankruptcy Court for the District of Delaware (the "**Court**") entered an order [Docket No. 55] (the "**Order**," a copy of which is attached hereto as Exhibit B) approving the Motion. Pursuant to the Order, the Court scheduled a final hearing with respect to the relief requested in the Motion as it relates to Severance Pay, Retention Pay<sup>2</sup> and any "cash out" of prepetition vacation or paid time off obligations upon termination.

**PLEASE TAKE FURTHER NOTICE** that any objections to entry of an order approving the relief requested in the Motion as it relates to Severance Pay, Retention Pay and any "cash out" of prepetition vacation or paid time off obligations upon termination must be filed on or before **July 9, 2009 at 4:00 p.m. (ET)** (the "**Objection Deadline**") with the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801. At the same time, you must serve a copy of the response upon the undersigned counsel to the Debtors so as to be received on or before the Objection Deadline.

<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

<sup>2</sup> Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Motion.

**PLEASE TAKE FURTHER NOTICE** THAT A FINAL HEARING TO CONSIDER THE RELIEF REQUESTED IN THE MOTION WITH RESPECT TO SEVERANCE PAY AND RETENTION PAY WILL BE HELD ON **JULY 16, 2009 AT 4:30 P.M. (ET)** BEFORE THE HONORABLE KEVIN J. CAREY AT THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE, 824 NORTH MARKET STREET, 5TH FLOOR, COURTROOM NO. 5, WILMINGTON, DELAWARE 19801.

**PLEASE TAKE FURTHER NOTICE** that if you fail to respond in accordance with this notice, the Court may grant the relief requested in the Motion with respect to the Severance Pay and Retention Pay without further notice or hearing.

Dated: Wilmington, Delaware  
June 18, 2009

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PROPOSED ATTORNEYS FOR DEBTORS  
AND DEBTORS IN POSSESSION

**EXHIBIT A**

Motion

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE:	)	
	)	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i> , <sup>1</sup>	)	
	)	Case No. 09- <u>12074</u> ( )
Debtors.	)	
	)	Joint Administration Requested
	)	

**DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING  
THE DEBTORS TO PAY (A) PREPETITION WAGES, SALARIES, AND  
OTHER COMPENSATION, (B) REIMBURSABLE EMPLOYEE EXPENSES,  
AND (C) EMPLOYEE MEDICAL AND SIMILAR BENEFITS; AND  
(II) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND  
PROCESS RELATED CHECKS AND TRANSFERS**

Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "**Debtors**"), submit this motion (the "**Motion**") for entry of an order, substantially in the form annexed hereto as **Exhibit A** (I) authorizing the Debtors to pay prepetition (a) wages, salaries, and other compensation, (b) reimbursable employee expenses, and (c) employee medical and similar benefits; and (II) authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are

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<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

Date Filed 6/16/09  
Docket No. 9

issued and authorized to be paid in accordance with this Motion. In support thereof, the Debtors respectfully represent:<sup>2</sup>

### JURISDICTION AND VENUE

1. The Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. sections 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. section 157(b). Venue is proper pursuant to 28 U.S.C. sections 1408 and 1409.

### RELIEF REQUESTED

2. By this Motion, the Debtors, pursuant to sections 105, 363, 1107(a), and 1108 of title 11 of the United States Code (the "**Bankruptcy Code**") and Federal Rules of Bankruptcy Procedure 6003 and 6004, request entry of an order granting them authority, in their sole discretion, to pay wage and benefit obligations, in the ordinary course of business and consistent with past practice, and to pay prepetition claims, honor obligations, and to continue programs, in the ordinary course of business and consistent with past practice, relating to: (a) Unpaid Compensation, Deductions and Payroll Taxes, Commissions Programs, Unpaid Independent Contractor Compensation, and Unpaid Temporary Employee Compensation; (b) Reimbursable Expenses; and (c) Employee Benefits (each as defined herein, and collectively, the "**Employee Wage and Benefit Obligations**").<sup>3</sup> As of the Petition

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<sup>2</sup> A description of the Debtors' business and the reasons for filing these Chapter 11 Cases is set forth in the Declaration of Paul S. Street in Support of Chapter 11 Petitions and First Day Relief (the "**Street Declaration**"), filed contemporaneously with this Motion. This Motion is supported by the Street Declaration.

<sup>3</sup> As of the Petition Date, the Debtors are defendants in various actions, including two putative wage and hour class actions (collectively, the "**Wage and Hour Litigation**"), relating to prepetition Employee Wage and Benefit Obligations allegedly owed by the Debtors to certain former employees. The Debtors dispute liability for any amounts sought in the Wage and Hour Litigation. Accordingly, by this Motion, the Debtors are not seeking to make any payments with respect to these disputed amounts, and will make no payments in respect thereof without further order of the Court.

Date, approximately \$12,900,000 has accrued on account of prepetition Employee Wage and Benefit Obligations.

3. The Debtors also seek entry of an order authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are issued and authorized to be paid in accordance with this Motion.

### **BACKGROUND**

4. On the date hereof (the "*Petition Date*"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code (the "*Chapter 11 Cases*"). The Debtors continue to operate their businesses and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these Chapter 11 Cases, and no committees have been appointed or designated.

5. The Debtors are one of the largest providers of residential building products and construction services in the United States. The Debtors distribute building materials, manufacture building components (e.g., millwork, floor and roof trusses, and wall panels), and provide construction services to professional builders and contractors through a network of 31 distribution facilities, 43 manufacturing facilities, and five regional construction services facilities.

6. The Debtors operate under two brand names: BMC West® and SelectBuild®.

- ***BMC West.*** Under the BMC West brand, the Debtors market and sell building products, manufacture building components, and provide construction services to professional builders and contractors. Products include structural lumber and building materials purchased from manufacturers, as well as manufactured

building components such as millwork, trusses, and wall panels. Construction services include installation of various building products and framing. The Debtors currently offer these products and services in major metropolitan markets in Texas, Washington, Colorado, Idaho, Utah, Montana, North Carolina, California, and Oregon.

- **SelectBuild.** Under the SelectBuild brand, the Debtors offer integrated construction services to production homebuilders, as well as commercial and multi-family builders. Services include wood framing, concrete services, managing labor and construction schedules, and sourcing materials. The Debtors currently offer these services in major metropolitan markets in California, Arizona, Nevada and Illinois.

7. The Debtors operate in metropolitan areas that have historically outpaced U.S. averages for residential building permit activity (largely in the Southern and Western portions of the United States). Based on National Association of Home Builders building permit activity, the Debtors provide building products and construction services in 9 of the top 25 single-family construction markets.

8. Prior to the Petition Date, the Debtors, with the assistance of their professionals and advisors, pursued several avenues to try to maximize the value of the Debtors' business, including conducting a process to sell the Debtors' business. The Debtors' prepetition sale process did not, however, yield offers that reflected, in the Debtors' business judgment, the true value of the Debtors' business operations.

9. Contemporaneously with this prepetition marketing and sale effort, the Debtors engaged in good faith, arm's-length negotiations with significant holders of the Debtors' prepetition secured indebtedness to develop a way to de-lever the Debtors' business, while at the same time providing the Debtors' unsecured creditor constituency with a substantial recovery. These negotiations culminated in the proposed chapter 11 plan (the

"*Plan*") and accompanying disclosure statement (the "*Disclosure Statement*"), filed contemporaneously with this Motion.

10. As set forth in greater detail in the Plan and Disclosure Statement, the Plan contemplates a restructure of the Debtors' balance sheet and ownership structure, as well as an immediate cash distribution to unsecured creditors and an opportunity for such creditors to receive full payment from the Reorganized Debtors, depending on business performance. The Debtors believe that the restructuring proposal embodied in the Plan provides the Debtors' creditors with the best means of maximizing value of the Debtors and their businesses. To implement this restructuring, the Debtors have obtained a commitment to provide \$80 million in the form of debtor-in-possession financing, which the Debtors seek to have approved by the Court contemporaneously herewith.

11. As of the Petition Date, the Debtors employ approximately 5,500 people. Approximately 300 of the Debtors' employees are represented by seven unions with whom the Debtors have collective bargaining agreements. For the 12 months ended March 31, 2009, the Debtors' total revenue totaled approximately \$1.1 billion. As of March 31, 2009 the book value of the Debtors' assets totaled approximately \$480 million and its liabilities totaled approximately \$481 million.

#### **THE DEBTORS' EMPLOYEES AND WAGE AND BENEFIT OBLIGATIONS**

12. As of the Petition Date, the Debtors employ approximately 5,500 employees (the "*Employees*"). Approximately 80 of the Employees are part-time (i.e., working less than 40 hours per week). In addition to their Employees, the Debtors supplement their workforce with independent contractors and temporary employees. Approximately 300 of the Employees are represented by one of seven local unions with whom the Debtors have collective bargaining agreements: Chicago Regional Council of Carpenters;



General Teamsters, Local Union No. 174; General Teamsters, Local Union No. 313; General Teamsters, Local Union No. 431; Lumber, Production & Industrial Workers Union Local No. 2633; U.B.C. Industrial Local Union No. 2218; and Western Council of Industrial Workers Local No. 2633.

13. Although the Debtors have paid their wage, salary, and other obligations in accordance with their ordinary compensation schedule prior to the Petition Date, as of the date hereof, certain prepetition obligations for Employees may nevertheless be due and owing. Further, certain Employees may be entitled to unpaid compensation because (a) discrepancies may exist between the amounts paid and the amounts that should have been paid and (b) some payroll or invoice checks issued to Employees prior to the Petition Date may not have been presented for payment or may not have cleared the banking system and, accordingly, have not been honored and paid as of the Petition Date.

**A. Wages, Salaries, and Compensation**

**1. Wage Obligations**

14. The Debtors pay approximately 75% of their Employees weekly and approximately 25% of their Employees semi-monthly. On average, the Debtors' monthly payroll obligations are approximately \$18,343,000.<sup>4</sup> The Debtors estimate they owe approximately \$3,200,000 on account of prepetition wages, salaries, and other compensation, excluding reimbursable expenses and vacation pay (the "*Unpaid Compensation*"). The Debtors do not believe that they owe any one Employee Unpaid Compensation (including

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<sup>4</sup> In this Motion, the Debtors' estimates of "monthly" amounts that are tied to payroll obligations or withholdings are estimates of the obligations or withholdings incurred or collected in connection with four weekly and two semimonthly payroll cycles.

under the Commission Program discussed below) in excess of the \$10,950 cap imposed by section 507(a)(4) of the Bankruptcy Code.

15. The Debtors outsource the vast majority of their payroll to a payroll services company, Automatic Data Processing, Inc. ("**ADP**"). ADP also is responsible for paying all withholding and payroll taxes to applicable third parties. The Debtors incur approximately \$749,000 per year in fees, plus the cost of software licensing, in connection with ADP's services (the "**ADP Service Fees**"). The Debtors seek authority, in their sole discretion, to continue to pay the ADP Service Fees. The Debtors estimate that approximately \$9,500 has accrued and not been paid on account of the ADP Service Fees prior to the Petition Date.

## **2. Gross Pay Deductions, Governmental Withholdings, and Payroll Taxes**

16. The Debtors routinely deduct certain amounts from their Employees' gross pay, including, without limitation: (a) garnishments, child support, and similar deductions and (b) other pre-tax and after-tax deductions payable pursuant to the employee benefit plans discussed herein (e.g., contributions relating to health care benefits, insurance premiums, flexible spending programs, and 401(k) plans) (collectively, the "**Deductions**"). On a monthly basis, the Debtors deduct and remit to appropriate third-party recipients approximately \$1,158,000 from the Employees' paychecks for the Deductions. The Debtors, however, may not have forwarded certain of the Deductions to the appropriate third-party recipients prior to the Petition Date. Accordingly, the Debtors seek authority to forward prepetition Deductions (and to continue to forward Deductions on a postpetition basis whether or not related to the prepetition period) to the applicable third-party recipients in the ordinary course of business and consistent with past practice. As of the Petition Date, the Debtors estimate that they owe approximately \$180,000 on account of prepetition Deductions.

17. In addition to the Deductions, applicable law requires the Debtors to withhold amounts related to federal, state, and local income taxes, as well as Social Security, Medicare, and Employment Insurance for remittance to the appropriate federal, state, or local taxing authority (collectively, the "*Withheld Amounts*"). The Debtors also are required to pay additional amounts for federal and state unemployment insurance (collectively, the "*Employer Payroll Taxes*," together with the Withheld Amounts, the "*Payroll Taxes*"). On a monthly basis, the Debtors withhold and remit approximately \$4,863,000 in Payroll Taxes. The Debtors estimate they owe approximately \$750,000 on account of prepetition Payroll Taxes.

### 3. Sales Commission Programs

18. Prior to the Petition Date, the Debtors offered various commissions programs to incentivize approximately 362 Employees to maximize sales and production (the "*Commissions Programs*"). Employees who participate in the Commissions Programs receive a base salary plus a monthly commission, calculated as a percentage of the gross profit dollars, based on average inventory costs, which are generated as a result of the Employee's activities. Generally, the Employee must exceed a pre-established hurdle of a gross dollar amount before a commission will be paid. The percentage of the commissions varies based on the difficulty of selling the particular product line. Unlike annual bonus programs or similar programs, the Employees count on the commissions earned under the Commissions Programs as part of their "salary."

19. The Debtors estimate that they owe approximately \$440,000 on account of prepetition Commissions Programs. The Debtors believe that as of the Petition Date no Employees are owed more than \$10,950 under the Commissions Programs. In addition, none

of these Employees entitled to benefits under the Commissions Programs are "insiders" as that term is defined in section 101(31) of the Bankruptcy Code.

#### **4. Independent Contractor and Temporary Employee Compensation**

20. The Debtors employ approximately 10 independent contractors that function as consultants with specialized knowledge. On average, the Debtors' monthly payments to independent contractors are approximately \$100,000. As of the Petition Date, the Debtors estimate that they owe approximately \$75,000 to independent contractors on account of independent contractor compensation obligations (the "***Unpaid Independent Contractor Compensation***"). The Debtors do not believe that they owe any one independent contractor in excess of the \$10,950 cap imposed by section 507(a)(4) of the Bankruptcy Code.

21. The Debtors employ temporary employees to work in the field and in administrative positions. The number of temporary employees engaged by the Debtors, at any given time, varies widely due to the cyclical nature of the Debtors' business, with a greater number of temporary employees being engaged in the warmer months. Through the first four months of 2009, the Debtors' monthly obligations with respect to the employment of temporary employees averaged approximately \$35,000 in the aggregate. The Debtors estimate they owe approximately \$50,000 to various temporary agencies on account of prepetition accrued and unpaid temporary employee obligations (the "***Unpaid Temporary Employee Compensation***"). The Debtors do not believe that they owe any one temporary employee in excess of the \$10,950 cap imposed by section 507(a)(4) of the Bankruptcy Code.

#### **5. Reimbursable Expenses**

22. Prior to the Petition Date, in the ordinary course of business, the Debtors reimbursed Employees for reasonable and customary expenses incurred on behalf of the Debtors in the scope of their employment, including Reimbursable Business Expenses and

Automobile Expenses (each as defined herein, and collectively, the "*Reimbursable Expenses*").

**(a) Reimbursable Business Expenses**

23. The Debtors routinely reimburse Employees and members of the Debtors' board of directors for expenses such as travel, meals, parking, automobile mileage, and other business-related expenses incurred in the scope of their employment on behalf of the Debtors (collectively, the "*Reimbursable Business Expenses*"). Employees and directors must submit an expense report with appropriate supporting documentation to receive reimbursement for their Reimbursable Business Expenses. The Debtors receive approximately 500 expense report requests each month totaling \$250,000 in Reimbursable Business Expenses each month.

24. Although the Debtors request that reimbursement requests be submitted promptly, and by the 25th of each month, not all of the Employees and directors do so. Thus, the Debtors are unable to provide a detailed listing of unpaid prepetition Reimbursable Business Expenses at this time because it is likely that Employees and directors will submit requests for expenses incurred prepetition after the Petition Date. Based on historical figures, however, the Debtors estimate they owe approximately \$250,000 on account of prepetition Reimbursable Business Expenses that remain unreimbursed.

**(b) Automobile Expenses**

25. The Debtors provide Employees who travel in excess of 12,000 miles per year on account of business a company-leased vehicle, or a base allowance plus adjustable fuel allowance for business travel expenses associated with the use of their own vehicle (collectively, the "*Automobile Expenses*"). For Employees who receive company-leased vehicles, the Debtors make the lease payments and pay the licensing, fuel, maintenance, and

insurance costs. These Employees are charged a monthly fee of \$100 for incidental, personal use. The Debtors estimate that their monthly expenses for company-leased vehicles are approximately \$300,000 in the aggregate and \$55,000 per month for base allowances plus fuel allowances. The Debtors estimate they currently owe approximately \$170,000 on account of prepetition Automobile Expenses.

**B. Employee Benefit Plans**

26. In the ordinary course of business, the Debtors maintain various employee benefit plans and policies, including, without limitation, health care, prescription drug benefits, dental and vision plans, vacation time and other paid leaves of absence, retirement savings plans, flexible benefit plans, life insurance, accidental death and dismemberment insurance, relocation programs, tuition reimbursement programs, severance and retention pay, short-term and long-term disability insurance, and retiree medical benefits (collectively, the "*Employee Benefits*").<sup>5</sup>

**1. Medical, Prescription Drug, Dental, and Vision Plans**

27. The Debtors provide medical, prescription drug, dental, and vision insurance coverage to all full-time and part-time Employees who work 24 or more hours per week and who have been employed by the Debtors for at least 90 days (collectively, the "*Health Benefits*"). The Debtors' estimated annual cost to administer the Health Benefits is approximately \$2,266,000. As of the Petition Date, the Debtors do owe any amounts in connection with administering the Health Benefits. In addition, the Debtors use a broker (Mercer) for the plans and pay a fixed administrative cost of \$25,000 per month for services

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<sup>5</sup> The Debtors' Employee Benefits are available to Employees who average 24 hours per week as well as certain former Employees, Independent Contractors, and consultants, subject to any eligibility requirements described herein.

rendered. As of the Petition Date, the Debtors owe approximately \$25,000 on account of these services.

- (a) **Medical Plan.** CIGNA administers the Debtors' self-insured medical plan for Employees (the "**Medical Plan**") and prescription drug plan (the "**Prescription Drug Plan**"). The average monthly cost of claims under the Medical Plan and Prescription Drug Plan is approximately \$2,400,000, of which the Debtors pay approximately 60% directly and the remainder is funded out of the deductions from the participating Employees' paychecks.

The Debtors also maintain Health Benefits for certain Employees located in California through two Health Maintenance Organizations ("**HMOs**") and Employees located in Washington through one HMO. They also provide certain limited Employees access to a Dental Maintenance Organization. The Debtors fund 60% of the premiums for these fully-insured programs which amounts to a monthly cost of approximately \$204,000 for the Debtors. As of the Petition Date, the Debtors do not believe that they owe any amounts to the HMOs.

- (b) **Dental Plan.** CIGNA administers the Debtors' self-insured dental plan for Employees (the "**Dental Plan**"). The average monthly cost of the Dental Plan is approximately \$200,000, of which the Debtors pay approximately 50% directly and the remainder is funded out of the deductions from the participating Employees' paychecks.
- (c) **Vision Plan.** The Debtors maintain a vision benefits plan for Employees (the "**Vision Plan**"), which is fully funded by the Employees. The average monthly cost of the Vision Plan is approximately \$18,000.

28. As of the Petition Date, the Debtors' actuarial estimates indicate that there is approximately \$5,500,000 outstanding on account of the Health Benefits, which amount the Debtors will be obligated to pay over the course of the next several months in the ordinary course of business as part of the monthly obligations described above.

## 2. **Vacation and Leaves of Absence**

29. The Debtors provide certain Employees with vacation time as a paid, time-off benefit (the "**Vacation Time**"). The amount of available Vacation Time, and the rate at which such Vacation Time accrues, is generally determined by which Debtor employs the Employee, the Employee's position, length of full-time employment, and the location of that

Employee's employment. All Employees are limited to 120 hours of usage of Vacation Time during 2009. Employees in California may carry over unused days of Vacation Time from year to year. If the Debtors terminate an Employee's employment, the Employee's final paycheck will include any available unused Vacation Time. As of the Petition Date, the Debtors estimate they owe approximately \$2,000,000 on account of Vacation Time accrued by Employees during the prepetition period. For most of the Debtors, this amount is generally not a current cash pay obligation as Employees only are entitled to be paid for accrued and unused Vacation Time in the event they are terminated.<sup>6</sup>

30. Employees can receive compensation while taking certain other leaves of absence as required by law (collectively, the "*Leaves of Absence*"). Employees on maternity, Family and Medical Leave Act, and disability leave receive compensation by using the Short-Term Disability Benefits (defined below) that are provided by the Debtors. In addition, while on jury duty, Employees receive 100% of their salary minus any amount paid to the Employee by the court. The Debtors do not accrue Leaves of Absence for their Employees, and Leaves of Absence are not reflected as a liability on the Debtors' balance sheet.

### **3. Employee Savings and Retirement Plans**

#### **(a) 401(k) Retirement Plans**

31. The Debtors maintain a retirement savings plan for the benefit of all eligible Employees that meet the requirements of section 401(k) of the Internal Revenue Code (the "*401(k) Plan*"). All full-time and part-time, salaried and hourly Employees who have

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<sup>6</sup> To the extent that employees have taken Vacation Time prior to the Petition Date and have not yet been compensated for such time, the Vacation Time is a current cash pay obligation of the Debtors.



been employed by the Debtors for at least six months and who are at least 21 years old are eligible to participate in the 401(k) Plan, except for Employees represented by General Teamsters, Local Union No. 431 or the Chicago Regional Council of Carpenters. The Debtors also maintain a limited matching program for the benefit of certain Employees represented by General Teamsters, Local Union No. 313 and the Western Council of Industrial Workers Local No. 2633 (the "**Matching Obligation**"). The Debtors' Matching Obligation is 50% of the first 6% contributed to the program by the eligible Employee. Approximately 1,600 eligible Employees currently participate in the 401(k) Plan, nine (9) of which receive payment on account of the Debtors' Matching Obligation.

32. The Debtors withhold approximately \$575,000 in the aggregate each month from participants' paychecks on account of their 401(k) contributions. On average, the Debtors pay approximately \$400 per month on account of Matching Obligations. As of the Petition Date, the Debtors are holding approximately \$50,000 in 401(k) contributions that have been withheld from participants' paychecks and owe approximately \$100 on account of Matching Obligations.

**(b) Retirement Benefits for Certain Union-Represented Employees**

33. The Debtors make contributions to the union-sponsored pension plans provided by certain of the unions that represent the Debtors' Employees. These contributions are made pursuant to the Debtors' collective bargaining agreements with those unions. In some cases, these payments are combined with payments made to the union on account of the represented Employees' retirement, health and welfare, and other union dues (collectively, the "**Union Retirement Obligations**"). The Debtors' average monthly obligation to make these

payments is approximately \$175,000. As of the Petition Date, the Debtors owe approximately \$88,000 on account of Union Retirement Obligations.

**4. Life, Accident, and Disability Insurance**

**(a) Life and Accidental Death and Dismemberment Insurance**

34. The Debtors provide basic term life and accidental death and dismemberment insurance coverage for various Employees in varying amounts, depending upon the given Employee's job classification and work location (the "*Life Insurance*") through Standard Insurance. On average, this coverage costs the Debtors approximately \$20,000 per month in the aggregate. As of the Petition Date, the Debtors do not believe that they owe any amounts in connection with Life Insurance.

35. The Debtors also offer their Employees the opportunity to purchase additional life and accidental death and dismemberment insurance coverage (the "*Voluntary Life Insurance*") through Standard Insurance. This coverage does not cost the Debtors any amounts as it is 100% Employee paid. The Debtors withhold approximately \$53,000 in the aggregate each month from participants' paychecks on account of the participants' Voluntary Life Insurance premium obligations. As of the Petition Date, the Debtors do not believe that they are in possession of any amounts that have been withheld from participants' paychecks but that have not yet been forwarded to Standard Insurance.

**(b) Disability Benefits.**

36. The Debtors also provide their full-time salaried and hourly Employees, who work 35 or more hours per week and who have been employed by the Debtors for at least 90 days, with short-term disability benefits (the "*Short-Term Disability Benefits*"). The program is self-funded by the Debtors. This coverage costs the Debtors approximately

\$49,000 per month in the aggregate. As of the Petition Date, the Debtors owe approximately \$7,000 on account of Short-Term Disability Benefits.

37. Employees who purchase long-term disability benefits (described below) are eligible for supplementary short-term disability benefits. Such Employees are entitled to 3 months of Short-Term Disability Benefits, and then the Debtors offer 3 additional months of "Bridge the Gap" coverage until the long-term disability benefits commence. This program is self-funded by the Debtors and is offered at no cost to the Employees. This coverage costs the Debtors approximately \$8,000 per month in the aggregate. As of the Petition Date, the Debtors owe approximately \$2,000 on account of "Bridge the Gap" coverage.

38. The Debtors provide their full-time salaried and hourly Employees with the ability to purchase long-term disability benefits (the "*Long-Term Disability Benefits*"). Standard Insurance underwrites and administers the Debtors' Long-Term Disability Benefits. This coverage does not cost the Debtors any amounts as it is 100% Employee paid. As of the Petition Date, the Debtors do not believe that they are in possession of any amounts that have been withheld from participants' paychecks but that have not yet been forwarded to Standard Insurance.

## **5. Flexible Benefit Plan**

39. The Debtors offer all of their full time salaried and hourly Employees who have been employed by the Debtors for at least 90 days the ability to contribute a portion of their pre-tax compensation to flexible spending accounts to pay for eligible out-of-pocket health care and dependent care costs and expenses (the "*Flexible Benefit Plan*"). CIGNA administers the Flexible Benefit Plan. The costs of administering the Medical Plan include the costs of administering the Flexible Benefit Plan. As of the Petition Date, the Debtors

estimate that they currently deduct approximately \$100,000 from participants' paychecks on account of the Flexible Benefits Plan each month. As of the Petition Date, the Debtors estimate that they are holding approximately \$50,000 that has been withheld from participants' paychecks but has not yet been debited by CIGNA.

**6. Relocation Program**

40. The Debtors maintain a relocation services program (the "***Relocation Program***") for eligible Employees who are required to relocate to a new job location, if approved by the Region Vice President and Vice President of Human Resources. The Debtors estimate that as of the Petition Date, they owe approximately \$40,000 on account of the Relocation Program.

**7. Tuition Reimbursement**

41. The Debtors also maintain a limited tuition reimbursement program, available to Employees who are required to maintain certain continuing education and licensing requirements. The Debtors have approved (but have not yet reimbursed) approximately \$10,000 on account of tuition reimbursements relating to the prepetition period.

**8. Severance Pay and Retention Pay**

**(a) Severance Pay**

42. The Debtors do not have a specific "Severance Policy." Prior to the Petition Date, the Debtors' practice was to provide eligible Employees who were terminated as part of a permanent reduction in force with severance payments that varied among the Debtors from a minimum of two weeks to a maximum of 12 weeks. The severance provided also varied among supervisory field employees and administrative employees. As of the Petition Date, the Debtors estimate that approximately \$19,500 remains outstanding on account of

ordinary course severance obligations to five former Employees. The Debtors do not believe that any one of these former Employees is owed in excess of the \$10,950 cap imposed by section 507(a)(4) of the Bankruptcy Code.

43. If the Debtors are unable to continue to provide severance payments to terminated Employees following the Debtors' past practices, current Employees may question the Debtors' commitment to continue their employment and such employees may seek other employment or be recruited by competitors because they have no assurance of any severance if their employment is terminated. Keeping employees of the Debtors in place and performing their employment duties is critical to the success of the Debtors. The Debtors believe that it is important to advise all Employees that postpetition, the past severance arrangements followed by the Debtors will continue. An important component of this message is the Debtors' payment of any outstanding amounts owed to their former Employees. Therefore, the Debtors request authorization to satisfy the outstanding severance obligations referenced above as part of their Employee Wage and Benefit Obligations and authorization to make severance payments to any Employees that are terminated after the Petition Date in accordance with the Debtors' past practices with respect to similarly situated Employees, in the ordinary course of business.

44. Separate and apart from their ordinary severance practices, prior to the Petition Date, the Debtors entered into severance agreements with certain former Employees which also contained a covenant that the terminated Employees would not compete with the Debtors (the "*Non-Competition Agreements*").<sup>7</sup> The Debtors entered into 10 Non-

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<sup>7</sup> In addition, the Debtors entered into employment agreements with various current employees which contain an obligation to make severance payments to those employees in the event that their employment is

[Footnote continued on next page]

Competition Agreements and have a contractual obligation to make the payments provided therein. In those cases where the Debtors believe that the value of the covenant not to compete is less than the amount of the obligations owed to the former Employees, the Debtors have sought to reject these contracts in the Debtors' Third Omnibus Motion for an Order Authorizing Rejection of Certain Unexpired Leases and Executory Contracts (the "**Rejection Motion**"), filed contemporaneously herewith. Although the Debtors are not seeking to assume their obligations under the remaining Non-Competition Agreements and the Debtors believe that they are authorized to continue making the payments pursuant to these executory contracts in the ordinary course of business under the authority granted to them by section 363(c) of the Bankruptcy Code, for the avoidance of doubt, the Debtors request authorization to continue making these payments until such time as the Debtors decide whether to assume or reject the Non-Competition Agreements. The Debtors' aggregate monthly obligation on account of the Non-Competition Agreements that are not the subject of the Rejection Motion is approximately \$52,000. The Debtors are not seeking authority to enter into similar agreements after the Petition Date at this time.

**(b) Retention Pay**

45. Prior to the Petition Date the Debtors entered into retention agreements with five of their Employees (the "**Retention Agreements**")<sup>8</sup> in order to induce these

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[Footnote continued from previous page]

terminated. The Debtors are not seeking to assume or reject those agreements at this time and will not make severance payments pursuant to those agreements unless they assume the agreements or obtain a subsequent order of the Court granting them the authority to do so.

<sup>8</sup> The Debtors entered into other employment agreements with various other employees which contain an obligation to make retention payments to those employees in the event that they remain employed with the Debtors until certain specified dates. The Debtors are not seeking to assume or reject those agreements at this

[Footnote continued on next page]

Employees to continue working for the Debtors to aid the Debtors in shutting down certain business units. These Employees will be entitled to receive payments pursuant to the Retention Agreements in the event that they remain employed with the Debtors as of June 30, 2009. The Debtors aggregate obligation on account of the Retention Agreements is approximately \$12,000. None of these Employees is owed in excess of the \$10,950 cap imposed by section 507(a)(4) of the Bankruptcy Code.

46. The Debtors believe that sufficient cause exists to justify payment in accordance with the terms of the Retention Agreements as part of their Employee Wage and Benefit Obligations. No Employee will receive more than he would otherwise be entitled to receive as an administrative expense priority claim pursuant to section 507(a)(4) of the Bankruptcy Code, and accordingly, the Debtors submit that junior creditors will not be harmed by the requested payments. If the Debtors do not honor their obligations under the Retention Agreements, however, the Debtors' other Employees will question the Debtors' commitment to honoring its promises to Employees. Such a disruption in Employee morale and confidence in the Debtors' commitment to their Employees would be harmful to the Debtors' estates and could lead to the departure of key Employees at this critical juncture in the Chapter 11 Cases.

47. Moreover, the Debtors anticipate that they will need the services of the affected Employees beyond June 30, 2009 and will be unlikely to obtain their services if they are not authorized to make the retention payments. In these circumstances, the Debtors have

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[Footnote continued from previous page]

time and will not make the retention payments contemplated by those agreements unless they assume the agreements or obtain a subsequent order of the Court granting them the authority to do so.

determined in the exercise of their sound business judgment that payment of the obligations owed pursuant to the Retention Agreements is necessary and aver that authorization to make such payments is justified.

**9. Retiree Medical Benefits**

48. The Debtors also provide certain eligible retired Employees with the opportunity to participate in the Debtors' self-insured medical plan (the "*Retiree Medical Benefits*"). In order to receive the Retiree Medical Benefits, the retired Employee must have been employed by the Debtors for at least 10 years, retired at an age greater than 55, and elected COBRA coverage following their retirement and maintained enrollment for the entire period allowed under federal law. Approximately six former Employees currently receive Retiree Medical Benefits. These employees pay 200% of the regular per-employee premium prior to age 65 and 150% of the premium after age 65, as that is when Medicare becomes the primary health care provider. The Debtors' only exposure on account of providing the Retiree Medical Benefits occurs when the claims submitted by the retirees exceed the premiums paid by the retirees. The Debtors propose to continue allowing retirees to access their medical plan, consistent with past practices, as this benefit is not likely to burden the Debtors' estates and its continuance will send an important signal to current Employees that the Debtors will continue to honor their promises to Employees even after those Employees retire.

**BASIS FOR RELIEF REQUESTED**

**A. Sufficient Cause Exists to Authorize the Debtors  
to Honor Employee Wage and Benefit Obligations**

**1. Certain of the Employee Wage and Benefit Obligations are Entitled to  
Priority Treatment**

49. Sections 507(a)(4) and 507(a)(5) of the Bankruptcy Code entitle the majority of Unpaid Compensation and other Employee-related obligations to priority



treatment. To confirm a chapter 11 plan, the Debtors must pay priority claims in full. *See* 11 U.S.C. § 1129(a)(9)(b) (requiring payment of certain allowed unsecured claims for (a) wages, salaries or commissions, including vacation, severance and sick leave pay earned by an individual and (b) contributions to an employee benefit plan). Thus, granting the relief sought herein only affects the timing of payments to Employees, and does not negatively impact recoveries for general unsecured creditors. Indeed, the Debtors submit that payment of Employee claims at this time enhances value for the benefit of all interested parties.

**2. Payment of Certain of the Employee Wage and Benefit Obligations is Required by Law**

50. The Debtors also seek authority to pay Deductions and Payroll Taxes to the appropriate entities. These amounts principally represent Employee earnings that governments, Employees, and judicial authorities have designated for deduction from Employees' paychecks. Indeed, certain Deductions, including contributions to the Employee Benefits programs and child support and alimony payments, are not property of the Debtors' estates because the Debtors have withheld such amounts from Employees' paychecks on another party's behalf. *See* 11 U.S.C. § 541; *see also City of Farrell v. Sharon Steel Corp.*, 41 F.3d 92, 95 (3d Cir. 1994) (observing the "well-settled principle that debtors do 'not own an equitable interest in property . . . [they] hold[] in trust for another,' and that therefore funds held in trust are not 'property of the estate.'" (quoting *Begier v. IRS*, 496 U.S. 53, 59 (1990))). Further, federal and state laws require the Debtors to withhold certain tax payments from Employees' paychecks and to pay such amounts to the appropriate taxing authority. *See* 26 U.S.C. §§ 6672 and 7501(a); *see also Sharon Steel*, 41 F.3d at 95-97 (finding that state law requiring a corporate debtor to withhold city income tax from its employees' wages created a trust relationship between debtor and the city for payment of withheld income taxes); *In re*

*DuCharmes & Co.*, 852 F.2d 194, 196 (6th Cir. 1988) (noting that individual officers of a company may be held personally liable for failure to pay trust fund taxes). Because the Deductions and Payroll Taxes are not property of the Debtors' estates, the Debtors request that the Court authorize them to transmit the Deductions and Payroll Taxes to the proper parties in the ordinary course of business.

**3. The Court may authorize payment of the Employee Wage and Benefit Obligations Pursuant to Section 363 of the Bankruptcy Code**

51. Courts have authorized payment of prepetition obligations under section 363(b) of the Bankruptcy Code where a sound business purpose exists for doing so. *See, e.g., In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989) (finding that a sound business justification existed to justify payment of prepetition wages); *see also Armstrong World Indus., Inc. v. James A. Phillips, Inc., (In re James A. Phillips, Inc.)*, 29 B.R. 391, 397 (S.D.N.Y. 1983) (relying on section 363 to authorize a contractor to pay prepetition claims of some suppliers who were potential lien claimants because payments were necessary for general contractors to release funds owed to the debtors). In addition, section 363(c) allows a debtor-in-possession to enter into transactions involving property of the estate in the ordinary course of business without an order of the court. *See, e.g., In re James A. Phillips*, 29 B.R. at 395 n.2 ("Insofar as transactions are actually in the ordinary course, they are authorized automatically by § 363(c)(1) and § 1107(a), and do not require Bankruptcy Court approval.").

52. The majority of the Debtors' Employees rely exclusively on their compensation, benefits, and reimbursement of expenses to satisfy their daily living expenses. Consequently, these Employees will be exposed to significant financial difficulties if the Debtors are not permitted to honor obligations for unpaid compensation, benefits, and reimbursable expenses. Moreover, if the Debtors are unable to satisfy such obligations,

Employee morale and loyalty will be jeopardized at a time when Employee support is critical. Furthermore, if the Court does not authorize the Debtors to honor their various obligations under the insurance programs, the Employees will not receive health coverage and, thus, may become obligated to pay certain health care claims in cases where the Debtors have not paid the respective insurance providers. The loss of health care coverage will result in considerable anxiety for Employees (and likely attrition) at a time when the Debtors need such Employees to perform their jobs at peak efficiency.

53. For all of the foregoing reasons, a sound business purpose exists to pay the Employee Wage and Benefit Obligations because those payments will allow the Debtors' business operations to continue without interruption. In the absence of such payments, the Debtors believe their Employees may seek alternative employment opportunities, perhaps with the Debtors' competitors. Such a development would deplete the Debtors' workforce, hinder the Debtors' ability to meet their customer obligations, and likely diminish creditors' confidence in the Debtors. Moreover, the loss of valuable Employees and the recruiting efforts that would be required to replace such Employees would be a massive and costly distraction at a time when the Debtors should be focusing on stabilizing their operations. Accordingly, the Debtors must be able to pursue all reasonable measures to retain their Employees by, among other things, continuing to honor all wages, benefits, and related obligations, including those that accrued prior to the Petition Date.

54. In addition, because the Debtors pay the Employee Wage and Benefit Obligations in the ordinary course of business, the Debtors submit that Court approval of the Debtors' payments is not necessary because of the authority granted to them by section 363(c) of the Bankruptcy Code. Nonetheless, for the avoidance of doubt, the Debtors request that the

Court grant the relief requested herein and enter an order authorizing them to pay the Employee Wage and Benefit Obligations in the ordinary course of the Debtors' business, and to continue paying their employees wages and benefits consistent with past practices, in the ordinary course of business.

**4. The Court may Authorize Payment of the Employee Wage and Benefit Obligations Pursuant to Section 105(a) of the Bankruptcy Code and the Doctrine of Necessity**

55. The Debtors proposed payment of the Employee Wage and Benefit Obligations should also be authorized pursuant to section 105(a) of the Bankruptcy Code and the "doctrine of necessity."

56. Section 105(a) of the Bankruptcy Code empowers the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." 11 U.S.C. § 105(a). A bankruptcy court's use of its equitable powers to "authorize the payment of pre-petition debt when such payment is needed to facilitate the rehabilitation of the debtor is not a novel concept." *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). "Under [section] 105, the court can permit pre-plan payment of a pre-petition obligation when essential to the continued operation of the debtor." *In re NVR L.P.*, 147 B.R. 126, 127 (Bankr. E.D. Va. 1992) (citing *Ionosphere Clubs*, 98 B.R. at 177); accord *In re Just for Feet, Inc.*, 242 B.R. 821, 825 (D. Del. 1999) ("To invoke the necessity of payment doctrine, a debtor must show that payment of the prepetition claims is 'critical to the debtor's reorganization.'" (quoting *In re Fin. News Network, Inc.*, 134 B.R. 732, 736 (Bankr. S.D.N.Y. 1991))); see also *In re Eagle-Picher Indus., Inc.*, 124 B.R. 1021, 1023 (Bankr. S.D. Ohio 1991) ("[T]o justify payment of a pre-petition unsecured creditor, a debtor must show that the payment is necessary to avert a serious threat to the Chapter 11 process.").

57. In a long line of well-established cases, federal courts have consistently permitted postpetition payment of prepetition obligations where necessary to preserve or enhance the value of a debtor's estate for the benefit of all creditors. *See, e.g., Miltenberger v. Logansport Ry.*, 106 U.S. 286, 311-12 (1882) (payment of pre-receivership claim prior to reorganization permitted to prevent "stoppage of [crucial] business relations"); *In re Lehigh & New Eng. Ry. Co.*, 657 F.2d 570, 581 (3d Cir. 1981) (holding that "if payment of a claim which arose prior to reorganization is essential to the continued operation of the...[business] during reorganization, payment may be authorized even if it is made out of [the] corpus"); *Dudley v. Mealey*, 147 F.2d 268 (2d Cir. 1945), cert. denied 325 U.S. 873 (1945) (extending doctrine for payment of prepetition claims beyond railroad reorganization cases); *Michigan Bureau of Workers' Disability Comp. v. Chateaugay Corp. (In re Chateaugay Corp.)*, 80 B.R. 279 (S.D.N.Y. 1987) (approving lower court order authorizing payment of prepetition wages, salaries, expenses, and benefits).

58. The "doctrine of necessity" functions in a chapter 11 reorganization as a mechanism by which the bankruptcy court can exercise its equitable power to allow payment of critical prepetition claims not explicitly authorized by the Bankruptcy Code. *See In re Boston & Me. Corp.*, 634 F.2d 1359, 1382 (1st Cir. 1980) (recognizing the existence of a judicial power to authorize trustees to pay claims for goods and services that are indispensably necessary to the debtors' continued operation); *In re Just for Feet, Inc.*, 242 B.R. 821, 824 (D. Del. 1999) ("[C]ourts have used their equitable power under section 105(a) of the Code to authorize the payment of pre-petition claims when such payment is deemed necessary to the survival of a debtor in a chapter 11 reorganization."). The doctrine is

frequently invoked early in a reorganization, particularly in connection with those chapter 11 sections that relate to payment of prepetition claims.

59. The court in *In re Structurlite Plastics Corp.*, 86 B.R. 922, 931 (Bankr. S.D. Ohio 1988), observed the decisional authority which supports "the principle that a bankruptcy court may exercise its equity powers under section 105(a) to authorize payment of prepetition claims where such payment is necessary to 'permit the greatest likelihood of survival of the debtor and payment of creditors in full or at least proportionately.'" (quoting *In re Chateaugay Corp.*, 80 B.R. at 287). The court stated that "a per se rule proscribing the payment of prepetition indebtedness may well be too inflexible to permit the effectuation of the rehabilitative purposes of the Code." *Id.* at 932. The rationale for the doctrine of necessity rule is consistent with the paramount goal of chapter 11 – "facilitating the continued operation and rehabilitation of the debtor...." *Ionosphere Clubs*, 98 B.R. at 176.

60. As stated above, the payment of the Employee Wage and Benefit Obligations is essential to the uninterrupted operation of the Debtors' business. In turn, the maintenance of the Debtors' business during these chapter 11 cases is crucial to the Debtors' ability to rehabilitate for the benefit of all stakeholders. Hence, this Court should exercise its equitable powers to grant the relief requested herein.

61. The importance of a debtor's employees to its operations has been recognized by courts in this district in granting relief similar to the relief requested herein.<sup>9</sup> *See, e.g., In re Sun-Times Media Group, Inc.*, Case No. 09-11092 (CSS) (Bankr. D. Del.

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<sup>9</sup> The Debtors have not annexed copies of the unreported orders cited herein because of their size. Copies of these orders, however, are available upon request of the Debtors' counsel, including at the hearing to consider the Motion.

Apr. 1, 2009); *In re Masonite Corp.*, Case No. 09-10844 (PJW) (Bankr. D. Del. Mar. 17, 2009); *In re Aleris Int'l, Inc.*, Case No. 09-10478 (BLS) (Bankr. D. Del. Feb. 13, 2009); *In re Portola Packaging, Inc.*, No. 08-12001 (CSS) (Bankr. D. Del. Aug. 29, 2008); *In re Hines Horticulture, Inc.*, No. 08-11922 (KJC) (Bankr. D. Del. Aug. 22, 2008); *In re Pierre Foods Inc.*, No. 08-11480 (KG) (Bankr. D. Del. July 16, 2008); *In re ACG Holdings, Inc.*, No. 08-11467 (CSS) (Bankr. D. Del. July 16, 2008); *In re Tropicana Entm't, LLC*, No. 08-10856 (KJC) (Bankr. D. Del. May 6, 2008); *In re Leiner Health Prods. Inc.*, No. 08-10446 (KJC) (Bankr. D. Del. Apr. 9, 2008); *In re Wickes Holdings, LLC*, No. 08-10212 (KJC) (Bankr. D. Del. Feb. 5, 2008); *In re Pope & Talbot, Inc.*, No. 07-11738 (CSS) (Bankr. D. Del. Nov. 21, 2007); *In re Delta Fin. Corp.*, No. 07-11880 (CSS) (Bankr. D. Del. Dec. 19, 2007); *In re Tweeter Home Entm't Group, Inc.*, No. 07-10787 (PJW) (Bankr. D. Del. June 13, 2007).

**C. The Court Should Authorize the Debtors'  
Banks to Pay the Claims Described Herein**

62. In connection with the foregoing, the Debtors respectfully request that the Court enter an order that (a) authorizes all applicable banks and financial institutions to receive, process, honor, and pay all checks presented for payment of, and to honor all fund transfer requests made by the Debtors related to, the claims the Debtors request authority to pay in this Motion, regardless of whether the checks were presented, or fund transfer requests were submitted, before or after the Petition Date and (b) provides that all banks and other financial institutions may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this application, and such banks and other financial institutions shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.

**D. Interim Relief is Justified**

63. Pursuant to Bankruptcy Rule 6003, the Court may grant relief within twenty (20) days after the filing of the petition regarding a motion to "use, sell, lease, or otherwise incur an obligation regarding property of the estate" only if such relief is necessary to avoid immediate and irreparable harm. As described above, the Debtors' Employees are integral to their operations. Failure to satisfy their obligations with respect to their Employees in the ordinary course of business during the first 20 days of the Chapter 11 Cases will jeopardize Employee loyalty and trust, possibly causing Employees to leave the Debtors' employ and severely disrupting the Debtors' operations at a critical juncture. Moreover, the Debtors' Employees rely on their compensation, benefits, and reimbursement of expenses to pay their living expenses and the effect could be financially ruinous if the Debtors cannot pay them in the ordinary course of business.

64. Accordingly, the Debtors submit that they have satisfied the requirements of Bankruptcy Rule 6003 to support immediate payment of the prepetition Employee Wage and Benefit Obligations and ongoing payment of employee wage and benefit obligations.

**DEBTORS' RESERVATION OF RIGHTS**

65. Nothing contained herein is intended or should be construed as an admission as to the validity of any claim against the Debtors, a waiver of the Debtors' rights to dispute any claim, or an approval or assumption of any agreement, contract, or lease under section 365 of the Bankruptcy Code. The Debtors expressly reserve their rights to dispute any claim asserted by an Employee under applicable non-bankruptcy law. Likewise, if this Court grants the relief sought herein, any payment made pursuant to the Court's order is not intended



and should not be construed as an admission as to the validity of any claim or a waiver of the Debtors' rights to dispute such claim subsequently.

### **REQUEST FOR WAIVER OF STAY**

66. To implement the foregoing, the Debtors seek a waiver of any stay of the effectiveness of the order approving this Motion. Pursuant to Bankruptcy Rule 6004(h), "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise." As set forth above, the immediate payment of amounts owed to Employees is essential to prevent potentially irreparable damage to the Debtors' operations, value and ability to reorganize. Accordingly, the Debtors submit that ample cause exists to justify a waiver of the 10-day stay imposed by Bankruptcy Rule 6004(h).

### **NOTICE**

67. No trustee, examiner, or creditors' committee has been appointed in these chapter 11 cases. The Debtors have provided notice of filing of the Motion either by electronic mail or facsimile and/or by overnight mail to: (a) the Office of the United States Trustee for the District of Delaware; (b) the 50 largest unsecured creditors of the Debtors on a consolidated basis as identified in the Debtors' chapter 11 petitions; and (c) counsel to Wells Fargo Bank, as agent for both of the Debtors' prepetition lenders and proposed postpetition lenders. As this Motion is seeking first-day relief, notice of this Motion and any order entered hereon will be served on all parties required by Local Rule 9013-1(m). Due to the nature of the relief requested, the Debtors respectfully submit that no further notice of this Motion is required.

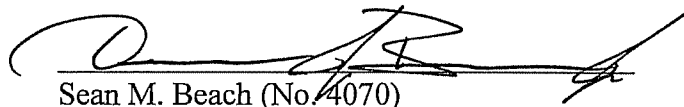
**NO PRIOR REQUEST**

68. No prior request for the relief sought in this Motion has been made to this or any other court.

WHEREFORE, the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as the Court may deem just and proper.

Dated: Wilmington, Delaware  
June 16, 2009

YOUNG CONAWAY STARGATT &  
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PROPOSED ATTORNEYS FOR DEBTORS AND  
DEBTORS IN POSSESSION

# **EXHIBIT A**

**Proposed Order**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE

IN RE:	)	
	)	Chapter 11
BUILDING MATERIALS HOLDING CORPORATION, <i>et al.</i> , <sup>1</sup>	)	Case No. 09- <u>12074</u> ( )
Debtors.	)	Jointly Administered
	)	
	)	Ref. Docket No. _____

**ORDER (I) AUTHORIZING THE DEBTORS TO PAY (A) PREPETITION WAGES, SALARIES, AND OTHER COMPENSATION, (B) REIMBURSABLE EMPLOYEE EXPENSES, AND (C) EMPLOYEE MEDICAL AND SIMILAR BENEFITS; AND (II) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS RELATED CHECKS AND TRANSFERS**

Upon consideration of the motion (the "*Motion*") of Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "*Debtors*") for entry of an order (I) authorizing the Debtors to pay prepetition (a) wages, salaries, and other compensation, (b) reimbursable employee expenses, and (c) employee medical and similar benefits; and (II) authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are issued and authorized to be paid in accordance with this Order, all as set forth in the Motion; and upon the Street Declaration<sup>2</sup> in support thereof; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C.

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<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

<sup>2</sup> Capitalized terms used herein but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

sections 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the Court (the "**Hearing**"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED:**

1. The Motion is granted as set forth below.
2. The Debtors are authorized, but not directed, to honor and pay, in the ordinary course of business and in accordance with the Debtors' prepetition policies and prepetition practices, employee wages and benefits, including, without limitation, any prepetition amounts owed in connection with the Employee Wage and Benefit Obligations.
3. No payments to any individual on account of Unpaid Compensation, the Commissions Programs, Unpaid Independent Contractor Compensation, or Unpaid Temporary Employee Compensation shall exceed the caps set forth in sections 507(a)(4) or 507(a)(5) of the Bankruptcy Code.
4. The Debtors are authorized, but not directed, to make severance payments to any Employees that are terminated after the Petition Date in accordance with the Debtors' past practices with respect to similarly situated Employees, in the ordinary course of business.
5. The Debtors are authorized to make payments pursuant to the Non-Competition Agreements until such time as the Debtors assume or reject those Agreements.

6. Nothing contained herein shall be deemed to direct the Debtors to pay any of the disputed amounts sought by former employees of the Debtors in the Wage and Hour Litigation without further order of the Court.

7. Nothing contained herein shall be deemed to authorize the payment of any amounts that may be subject to section 503(c) of the Bankruptcy Code.

8. The Debtors are authorized, but not directed, to forward any unpaid amounts on account of Deductions or Payroll Taxes to the appropriate third-party recipients or taxing authorities in accordance with the Debtors' prepetition policies and practices.

9. The Debtors are authorized to pay costs and expenses incidental to payment of the Employee Wage and Benefit Obligations, including all administrative and processing costs and payments to outside professionals, including the ADP Service Fees, in the ordinary course of business.

10. Nothing contained herein is intended or should be construed to create an administrative priority claim on account of the Employee Wage and Benefit Obligations.

11. All applicable banks and other financial institutions are hereby authorized, when requested by the Debtors, to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Order whether presented prior to or after the Petition Date. Such banks and financial institutions may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this order, and such bank or financial institution shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.

12. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in respect of the Employee Wage and Benefit Obligations that are dishonored or rejected.

13. Nothing in the Motion or this Order, nor as a result of the Debtors' payment of any Employee Wage or Benefit Obligation pursuant to this Order, shall be deemed or construed as an admission as to the validity or priority of any claim against the Debtors, a waiver of the right to dispute any claim, or an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code.

14. Nothing in this Order shall prohibit the Debtors from seeking Court authority to increase the prepetition amounts authorized to be paid hereunder.

15. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

16. Rule 6003(b) of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*") has been satisfied.

17. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such motion and the requirements of Bankruptcy Rule 6004(a).

18. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

19. This Court shall retain jurisdiction with respect to all matters arising from or relating to the interpretation or implementation of this Order.

Dated: Wilmington, Delaware  
June \_\_\_\_, 2009

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UNITED STATES BANKRUPTCY JUDGE

**EXHIBIT B**

Order



**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

**IN RE:**

**BUILDING MATERIALS HOLDING  
CORPORATION, *et al.*,<sup>1</sup>**

**Debtors.**

)  
) **Chapter 11**

)  
) **Case No. 09-12074 (KJC)**

)  
) **Jointly Administered**

)  
) **Ref. Docket No. 9**

**INTERIM ORDER (I) AUTHORIZING THE DEBTORS TO PAY (A) PREPETITION  
WAGES, SALARIES, AND OTHER COMPENSATION, (B) REIMBURSABLE EMPLOYEE  
EXPENSES, AND (C) EMPLOYEE MEDICAL AND SIMILAR BENEFITS; AND  
(II) AUTHORIZING FINANCIAL INSTITUTIONS TO HONOR AND PROCESS  
RELATED CHECKS AND TRANSFERS**

Upon consideration of the motion (the "*Motion*") of Building Materials Holding Corporation and its affiliates, as debtors and debtors in possession (collectively, the "*Debtors*") for entry of an order (I) authorizing the Debtors to pay prepetition (a) wages, salaries, and other compensation, (b) reimbursable employee expenses, and (c) employee medical and similar benefits; and (II) authorizing banks and other financial institutions to receive, process, honor, and pay checks or electronic transfers used by the Debtors to pay the foregoing and to rely on the representations of such Debtors as to which checks are issued and authorized to be paid in accordance with this Order, all as set forth in the Motion; and upon the Street Declaration<sup>2</sup> in support thereof; and the Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C.

<sup>1</sup> The Debtors, along with the last four digits of each Debtor's tax identification number, are as follows: Building Materials Holding Corporation (4269), BMC West Corporation (0454), SelectBuild Construction, Inc. (1340), SelectBuild Northern California, Inc. (7579), Illinois Framing, Inc. (4451), C Construction, Inc. (8206), TWF Construction, Inc. (3334), H.N.R. Framing Systems, Inc. (4329), SelectBuild Southern California, Inc. (9378), SelectBuild Nevada, Inc. (8912), SelectBuild Arizona, LLC (0036), and SelectBuild Illinois, LLC (0792). The mailing address for the Debtors is 720 Park Boulevard, Suite 200, Boise, Idaho 83712.

<sup>2</sup> Capitalized terms used herein but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

sections 1408 and 1409; and the Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and notice of the Motion and the opportunity for a hearing on the Motion was appropriate under the particular circumstances; and the Court having reviewed the Motion and having considered the statements in support of the relief requested therein at a hearing before the Court (the "*Hearing*"); and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefor,

**IT IS HEREBY ORDERED:**

1. The Motion is granted as set forth below.
2. With the exception of Severance Pay and Retention Pay items, and subject to other provisions of this Order, the Debtors are authorized, but not directed, to honor and pay, in the ordinary course of business and in accordance with the Debtors' prepetition policies and prepetition practices, employee wages and benefits, including, without limitation, any prepetition amounts owed in connection with the Employee Wage and Benefit Obligations, provided that payments on account of prepetition amounts owed in connection with the Employee Wage and Benefit Obligations shall not exceed \$12,900,000 in the aggregate; provided further, that pending a final hearing on this Motion, nothing herein authorizes the Debtors to pay cash on account of prepetition vacation or paid time off obligations to Employees unless such payment is required by applicable state law.
3. No payments to any individual on account of Unpaid Compensation, the Commissions Programs, Unpaid Independent Contractor Compensation, or Unpaid Temporary

Employee Compensation shall exceed the caps set forth in sections 507(a)(4) or 507(a)(5) of the Bankruptcy Code.

4. A final hearing with respect to the Motion (including Severance Pay, Retention Pay and any "cash out" of prepetition vacation or paid time off obligations upon termination) shall be held on July 16, 2009 at 4:30 p.m. prevailing Eastern Time. Any objections or responses to the Motion shall be filed on or before July 9, 2009, and served on the parties, as required by the Local Rules of Bankruptcy Practice and Procedure for the United States Bankruptcy Court for the District of Delaware.

5. Nothing contained herein shall be deemed to direct the Debtors to pay any of the disputed amounts sought by former employees of the Debtors in the Wage and Hour Litigation without further order of the Court.

6. Nothing contained herein shall be deemed to authorize the payment of any amounts that may be subject to section 503(c) of the Bankruptcy Code.

7. The Debtors are authorized, but not directed, to forward any unpaid amounts on account of Deductions or Payroll Taxes to the appropriate third-party recipients or taxing authorities in accordance with the Debtors' prepetition policies and practices.

8. The Debtors are authorized to pay costs and expenses incidental to payment of the Employee Wage and Benefit Obligations, including all administrative and processing costs and payments to outside professionals, including the ADP Service Fees, in the ordinary course of business.

9. Nothing contained herein is intended or should be construed to create an administrative priority claim on account of the Employee Wage and Benefit Obligations.

10. All applicable banks and other financial institutions are hereby authorized, when requested by the Debtors, to receive, process, honor, and pay any and all checks and transfer requests evidencing amounts paid by the Debtors under this Order whether presented prior to or after the Petition Date. Such banks and financial institutions may rely on the representations of the Debtors with respect to whether any check or other payment order drawn or issued by the Debtors prior to the Petition Date should be honored pursuant to this order, and such bank or financial institution shall not have any liability to any party for relying on such representations by the Debtors as provided for herein.

11. The Debtors are authorized to issue postpetition checks, or to effect postpetition fund transfer requests, in replacement of any checks or fund transfer requests in respect of the Employee Wage and Benefit Obligations that are dishonored or rejected.

12. Nothing in the Motion or this Order, nor as a result of the Debtors' payment of any Employee Wage or Benefit Obligation pursuant to this Order, shall be deemed or construed as an admission as to the validity or priority of any claim against the Debtors, a waiver of the right to dispute any claim, or an approval or assumption of any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code.

13. Nothing in this Order shall prohibit the Debtors from seeking Court authority to increase the prepetition amounts authorized to be paid hereunder.

14. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Motion.

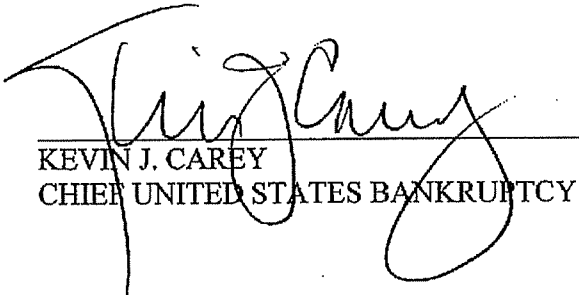
15. Rule 6003(b) of the Federal Rules of Bankruptcy Procedure (the "*Bankruptcy Rules*") has been satisfied.

16. Notice of the Motion as provided therein shall be deemed good and sufficient notice of such motion and the requirements of applicable rules.

17. Pursuant to Bankruptcy Rule 6004(h), the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

18. This Court shall retain jurisdiction with respect to all matters arising from or relating to the interpretation or implementation of this Order.

Dated: Wilmington, Delaware  
June 17, 2009



KEVIN J. CAREY  
CHIEF UNITED STATES BANKRUPTCY JUDGE